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PROFESSIONAL ETHICS—II.

(*Continued from Page* 149.)

It is not possible in this lecture to recount even briefly the history of the profession in England which, I trust, you will endeavour to make a special study of, for to us in this country, the famous lawyers of England are the chief inspiration, and their traditions must largely supply the rules for our guidance. Pleaders or advocates existed in England in very early times, as early as the time of William Rufus. There is perhaps no country in the world where the conduct of advocates has been made so little the subject of legislative interference as in England. The same is practically the case in America. A statute of Edward I dated 1275 made any manner of "deceit or collusion in the King's Court or consent unto it in deceit of the Court or to beguile the Court or the party" on the part of a Sergeant punishable with imprisonment for a year and a day, and he was not to be heard to plead in that Court for any man. There are several classes of practitioners in England: *first*, Barristers ; *secondly* Solicitors ; I shall group three classes under one heading : Special Pleaders, Draughtsmen in Equity and Conveyancers; and *fourthly*, Notaries Public. The 1st and 3rd classes—Barristers and Special Pleaders and Draughtsmen in Equity and Conveyancers derive their authority to practise from the Inns of Court ; Solicitors are enrolled by the Master of the Rolls who, you know, is the second judicial officer in the country, being inferior only to the Lord Chancellor. The roll of Solicitors is kept by the Incorporated Law Society. With regard to Notaries Public they derive their authority from the Court of Faculties of the Archibshop of Canterbury. All except Barristers require annual certificates to authorise them to practise. You will observe that the division of practitioners in England is according to the nature of the work they do. We have

no such division here. The grades of practitioners here are arranged according to the courts in which they are entitled to practise. The Inns of Court originally were associations of apprentices[1] *i. e.*, legal practitioners who were not Sergeants. These Inns of Court are voluntary incorporated societies. They are composed of Benchers, utter Barristers and students. In the Benchers is vested the government of the Inn. They have the power to admit students and to call them to the bar which entitles them afterwards to practise. They are supposed to derive their authority from the judges of the country by delegation. They form a kind of domestic tribunal. Their decisions are subject to appeal to the Lord Chancellor and the Judges of the High Court in virtue of their visitorial jurisdiction. They have the power to sit in judgment over the conduct of the utter barristers, *i. e.*, the ordinary junior barristers who are not King's Counsel, and they have the power to dismiss students. They have to state the reasons for disbarring any person. They have the power similarly to disbench any of the benchers also for reasons to be stated, and their decisions with respect to both these classes are subject to appeal to the Lord Chancellor and the Judges. If they refuse to admit a student it was formerly supposed that there was no appeal from their decision, but now there is an appeal to the Court which is supposed to hear it with the consent of the Inns of Court. As they are a kind of domestic forum, their decisions cannot be attacked collaterally; *i. e.*, the only way to set them aside is by an appeal from that decision itself. If that is not done and the question of the propriety of any decision that they may pass is called in question the Court will refuse to hear any such objection. The Sergeants were a most important class in former times. The order has now ceased to exist. They were chosen from the apprentices. There was no body besides the Inns of Court till the year 1883 to control the profession or to represent its interests. In that year the Bar Committee was formed to collect and express the opinions of the bar on matters affecting the profession. The place of this committee was taken in 1894 by a General Council of the Bar. The chief duty of this General Council is to answer questions, and to lay down rules regarding etiquette and to arbitrate between barristers and solicitors. Now wherever a barrister

1. All practitioners who were not Sergeants were called apprentices.

may practise he is subject to the jurisdiction of his Inn and no person can practise in the courts without being a member of some Inn. If, therefore, a man ceases to be a member of one Inn and does not become a member of another Inn he *ipso facto* ceases to have the right to practise in any court. A person may get himself disbarred at his own instance if he wants, for instance, to become a solicitor, for no one can become a solicitor who is on the roll of barristers. With regard to solicitors, an application to strike off a solicitor had formerly to be made to the court; now it may be made to the Incorporated Law Society, and the complaint will be heard by a Statutory Committee of that Society, who report to the High Court. Even now, however, applications may be made direct to the court, for it has been held in *In re Weare, a Solicitor. In re the Solicitors Act*, 1888[1], that the jurisdiction of the courts was not ousted by the delegation of some of their powers to the Incorporated Law Society. You will see from what I have said that the Court does not disbar a member of the English bar if it finds him guilty of misconduct. It makes a report to the Inn to which he belongs and the Inn deals with him. Of course the recommendation of a judge will be attended to with respect. In the great Tichborne case where the counsel who appeared for Tichborne behaved in a most scandalous fashion, the judges possessed themselves in great patience, so long as the trial lasted, because they were anxious that the conduct of the advocate or any remarks made by the judges with respect to his conduct should not in the slightest degree prejudice the client. But after the trial was concluded *Cockburn* C. J. made an address to the bar in which he animadverted in very strong terms on the conduct of Dr. Kenealy. The result was that on a representation to his Inn he was disbarred.

It would appear that eloquence was not one of the strong points of the English bar till the end of the 18th century, though its members were highly remarkable for sound and logical argument, immense learning and research and wonderful familiarity with precedents, which last quality perhaps has always been the greatest characteristic of lawyers in England, where codification has not yet found much favour. It is a very remarkable fact that in England, the land of freedom, persons accused of the gravest crimes were not allowed to be defended by advocates. The

1. (1893) 2 Q. B. D. 439.

settled rule of the Common Law was that in an indictment for treason or felony no person was allowed to have the services of counsel, unless some point of law should arise, proper to be debated, and the judges were to decide this matter, *i. e.*, whether there was a question of law, beforehand, as the case arose before them, and very often the assistance asked for by the prisoner was refused. This system, which appears to be absolutely indefensible, was defended on various ingenious grounds by eminent men. They said that the court was counsel for the prisoner, that the evidence in such cases ought to be so very evident and so plain that all the counsel in the world should not be able to answer it. SIR JOHN DAVIES, in the instructive preface to his reports, ventured indeed to say that "our law doth abhor the defence and the maintenance of bad cases more than any other law in the World" and that "it is an honour unto our law that it doth not suffer its professors to dishonour themselves, as the advocates and orators in other countries do, by defending such offenders." This indefensible law was not modified until the time of William III and it was not finally swept away before the passing of 6 & 7 William IV, Chapter CXIV.

While the profession of an advocate has always been regarded as one of the noblest, you all know that lawyers are one of the most suspected classes of people. The ordinary mind cannot easily reconcile itself to the notion that many of the most esteemed citizens should make it their daily work to employ all the resources of a cultivated intellect, of laboriously acquired learning and matured powers of persuasion and all their talents and energies in advocating whatever cause they are paid to support. They are shocked to see a learned lawyer put forward contradictory views in the course of the same week or perchance the same day out of the stores of his learning. They think that the lawyer identifying himself with the client's interest must often yield to the temptations to which the client himself is subject, and that he is likely to use low arts to persuade judges that his cause is just, and to use technicalities to defeat justice. They see the services of the best lawyers secured by the rich and influential against the poor and the weak and they regard them as the instruments used to crush the latter for the benefit of their oppressors. The public are particularly indignant when they see that

some notoriously wicked criminal gets out of the clutches of justice through the plausible advocacy of a distinguished and respected advocate. Now these are not criticisms to be despised, though they are not sound and are unjust to the profession. They certainly indicate some of the pitfalls that every advocate will meet on his way and which he must labour hard to avoid so that he may perceive clearly and maintain steadily the limits of fair and honourable advocacy. At the same time, there is no profession whose members extort the admiration and win the gratitude, both of individuals and the public, by strict and faithful discharge of their duty.

Not many in these days, I think, will subscribe to the Egyptian idea of preventing all advocacy; perhaps, I may add, that few people of discernment will agree that in the blessed land of Utopia there will be no place for lawyers.

But the idea is certainly very prevalent that the profession of a lawyer is inconsistent with a stern sense of moral obligation. I think it is desirable that none of you should enter on the profession with any such doubts regarding the nature of your vocation. What then is the true theory of an advocate's profession? Is he bound to take up any cause that he is asked to undertake or to do anything that a client wishes him to do? Is it right on his part to do everything he can to win his cases? These are questions that I shall have to attempt to answer in various shapes in these lectures. A few preliminary observations must suffice at present. Those who attack the profession ignore the essential conditions of the administration of justice and confound the functions of the judge and the advocate. In any stage of society, except the most primitive, it is impossible that every litigant could be able to argue his own cause. Whatever effort may be made to make the law simple and intelligible, it must remain too complex and difficult to most men. Amidst the many concerns of life it would be intolerable if every man had to study the law so as to be able to dispense with the services of advocates. It would be a physical impossibility with the man of business. It would be an economic blunder if it were insisted on. The poor, the uneducated, the credulous and the straightforward will not be able to obtain justice without the help of those who are trained in exposing falsehood, in disentangling complexities, and in grouping facts and exhibiting them in a clear light. No judiciary,

however well trained and conscientious, however anxious to avoid the bias, natural to all men, can cope with the task of finding out the truth and correctly administering the law of the land without the help of men who can draw attention to every individual fact of a case, help the judiciary to examine the proportions of all the facts constituting a problem and to consider and determine the particular rules of law applicable so as to do justice in the particular case without setting a precedent that may be mischievous in the future. For, it has to be remembered that every case has an influence on all subsequent cognate cases. An advocate is not like a speaker on a public platform or in a political assembly whose duty it is to express his deliberate convictions on a particular question and not to influence the opinions of others by stating what he does not believe to be true. The duty of an advocate, on the other hand, is to supply a part of the material out of which a decision is to be arrived at by others—the part, that is, which relates to one side of the question. It is the duty of the opposing advocate to marshal similarly the materials on the other side. It is then the duty of the judge to array and consider the conflicting probabilities, to weigh the evidence, to test the soundness of the legal arguments and determine the proper judgment to be delivered in the case. This, I have no doubt, will be found to be the most satisfactory course in the long run. Even were it possible, it would not conduce to the proper elucidation of a case, if lawyers took up the position of assessors and tried to place both sides of a case before the court. It is by concentrating the attention on one aspect of a case alone that that aspect can be brought out in bold relief and clear outline; and when it is remembered that every judge is fully aware what an advocate purports to do, no harm can result from an emphatic or colored representation by the lawyer on each side. Boswell once asked Johnson: "Is it right, sir, for an advocate to take up a case which is bad?" Johnson answered: "Do you know it is good or bad until a judge determines it?" No doubt it may happen that the combatant advocates are not equally matched in skill, but having regard to the large number of able men at the bar and to the fact that inequality in the advocates could seldom be a real obstacle to every conscientious and industrious lawyer being able to satisfactorily work up his own case, I do not think that justice

is likely to suffer on this ground; all the more so, if the occupants of judicial offices are properly qualified and equipped for their task.

The lawyer, it is hardly necessary to remind you, speaks only as the representative of his client, and no judge will or should understand him to do otherwise. It equally behoves the advocate to bear this important fact in mind, and never to make a declaration of his own opinion as to the merits of the case he is pleading. I think that this rule is equally applicable to questions of law. It would be unfair if an eminent advocate known to be a sound lawyer should attempt to gain an advantage for his client by stating that in his own opinion the client would be entitled to succeed, nor is it right, in any view of the question, for a judge to ask an advocate what his own opinion on the matter he is arguing is. It would be proper, if such an occasion should arise, for the advocate to decline to state his own view. *Cockburn* C.J. found fault seriously with Sergeant Sheel for declaring that in his opinion his client Palmer who was charged with causing death by administering poison was not guilty. This is a matter which I shall have occasion to refer to in a subsequent lecture.

Now one matter that I should like specially to impress on you at once is that though advocacy may be to many of you the means of livehihood, it is not to be regarded as a mere trade or business. James Hinton, physician and philosopher, wrote to a friend in 1851 in these terms: "I have been struck lately with the incompatibility that exists between our commercial system and the practice of all the professions; there is an inherent discord that can never be reconciled and it becomes more and more extreme as the former is developed and perfected. I should say that the trading spirit works atrociously in respect to divinity, abominably with respect to physics, and scandalously in regard to law. * * * * * * * The element of trust is conspicuous in all the leading professions of divinity, law and physics, ministering as they do to the mind, body and estate of men; in all these special confidence is reposed by those seeking help or in need of help from skilled advisers. All who enter professional life should be inspired by the belief that it is, and that it may be made for them and by them

a great and noble vocation, not to be used merely, much less abused, for their own purposes, but to be followed as a means of rendering service to others and to the community. That is, and always has been, the lawyer's ideal, sometimes lost sight of or obscured in the practice of the profession, but always kept uppermost and cherished as the aim by its best and worthiest leaders.

"Now when 'commercialism' or the trading spirit is as a term applied to the law the allusion is to the questionable, the unscrupulous methods employed in business where competition is keen and success is supposed to be justified by any means used to bring it about. Then the ruling maxim is 'business is business,' implying thereby that business has its own lines of action without regard to ethical restraints. The trader, as such, it has been said, 'seeks to keep on the safe side of the law, to get as much as he can for as little as he can, to make as much out of the customer as is consistent with keeping him as a customer, to be an adept at puffing, to make things appear as they are not, often not to deceive the customer, but to enable the customer to deceive others.' This kind of dealing may swell the bank account, but it dwarfs the soul of the man. Greed of gain is the essence of commercialism and the love of money is no modern innovation, even in law, though never before was the pursuit of wealth more persistent and engrossing.

"No stronger words of warning against this professional danger have been spoken than I now give from the lips of Sir James Dyer, Lord Chief Justice in 1567. In that year a jury of 24 attorneys and officers of the law were empanelled to enquire into prevalent abuses and, in the charge to them delivered, the Chief Justice deplored the greedy and inordinate desire to be suddenly enriched. 'Men,' he said, 'cannot abide and tarry time and space, but in all post haste must be rich and have abundance by and by. * * This post-hasting and running after riches, this great thirst and covetousness is reproved and condemned as most detestable.' The man who is engrossed with the money-making temper will have to struggle with many temptations, to swerve from what is right and what he knows to be right. If the idea of the worth of his profession centres in costs, if he makes that the be-all and end-all of his daily round, then

there is no greater nuisance among men—the money-grubbing pettifogger."

No advocate should forget that though he is representing a particular client he is an officer of the court and owes duties to it, which we shall have to consider in some detail. His office is one of exceptional responsibility, not only towards his client whose fortunes, interests, reputation and secrets, are confided to his care, but also towards the public. He occupies a favoured position towards all people who appear as witnesses. His privileges in examining them are extremely wide and his liberty of speech is practically unlimited. Need I say that these exceptional advantages should never be used for the lawyer's own personal advantage or for the gratification of his client's malice towards his adversary? I would solemnly ask you to lay this to your heart and never to yield to the temptation of prostituting the privileges of your high office by making yourself the instrument of oppression. I am sure it is unnecessary to refer to the fact that every advocate on admission swears allegiance to the Sovereign of the Country. In the discharge of your duty to your clients, you will be fearless and independent, fearless alike to the high and the low, but let me remind you of a great newspaper editor whose patriotism induced him to withhold for a time a piece of political news, the immediate publication of which might have led to a national catastrophe by bringing about a war—though it would have brought him thousands of pounds. Do not forget in your professional work, which will no doubt be your means of livelihood, that as citizens you owe duties to the Country and to the Community. Discourage dishonest litigation as well as dubious and desperate litigation. There is much scope in this country for work in this direction; do not identify yourselves too closely with those whose true interests it will be your duty to protect in all proper ways. The profession you are preparing to enter is no doubt a difficult one. It requires extensive and arduous preparation and continued and strenuous work. Success is slow and uncertain. The work that you are at first likely to be able to do may appear tedious and dry, but if you persevere and do your work with a full sense of its responsibility, you are sure to become useful citizens. Some of you at least will win ample rewards and all can have the

satisfaction of taking part in one of the noblest tasks that it is possible for a man to undertake.

What I have said already is probably a sufficient justification for a somewhat detailed consideration of some of the topics already referred to. In India the young lawyer suffers from the disadvantage of the absence of any settled traditions to guide his conduct and unfortunately few professions present so many questions of casuistry, so many delicate questions as to what is the right course to pursue in any particular case, that it is highly desirable to have some practical rules of conduct in writing. Rules are necessary even for the best. Self-interest is a misleading factor when you have to decide on the spur of the moment what is best to be done in the circumstances. The fact that there are no definite rules and that much discretion is given to the individual will itself be an additional source of temptation. Never adopt the standard of a business profession. But after all whatever light we may seek to get from rules of conduct which have been prescribed both in England and in other countries, a great deal will have to be left to individual conscience. Nothing but a determination to err always on the safe side in cases of doubt will enable you to do your duty conscientiously. In this country, it must be confessed that very often practitioners are guilty of questionable conduct owing to ignorance. They really do not know what is proper to be done in any particular case, and as there are no rules to guide them, no settled traditions to serve as an inspiration, each one is a law unto himself. In England, you know, the Attorney-General is the final authority upon all questions of professional etiquette, and if any member of the bar is in doubt as to what his conduct should be in any particular case, he goes to the Attorney-General for the solution of his difficulty. We have another difficulty in this country in the fact that there are various grades of pleaders. In England, as you have seen, practitioners are classed according to the nature of the work they do, but here it is according to the courts in which they practise and it is no easy thing to bring home to all grades of pleaders the right rules of conduct. There is again no feeling of solidarity in the profession or of mutual responsibility. There is no association like the Bar Council

in England or the Bar Associations which are found in almost every state in the United States. At the same time the number of practitioners is growing very fast. It is not desirable that their guidance should be altogether under judicial control ; indeed it would be impossible for judges to control the bar satisfactorily. Too strict a discipline on the part of the courts is likely to impair the independence and self-reliance of the members of the bar; it is all the more necessary, therefore, that there should be disciplinary bodies and that the profession itself should try and frame rules for its own guidance. In applying English rules one mistake is apt to be committed. You are aware that in England there are two main classes of practitioners—baristers and attorneys—and the code of rules applicable is not always the same with respect to both. Both, of course, should act from a very high sense of duty; rules of discipline are equally applicable to both, and both alike strive to discharge their duties to their clients and the public honourably, but still the attorney's profession is supposed to be more of the nature of a business profession than that of a barrister. In this country vakils are both attorneys and advocates, and a difficulty often arises to the best men whether in any particular case they are to adopt the rule applicable to attorneys or to advocates. The best solution stated in one word would be to act on this principle in every case. In everything which limits your discretion and restrains you from acting to the disadvantage of others, apply to yourself the rule applicable to barristers. In everything which imposes tasks upon you which may not fall on the shoulders of barristers, in everything which increases your responsibility, the work you have to do for your client, follow the rule applicable to attorneys. Then, you cannot go wrong.

Gentlemen, I have indicated the field of study which we shall have to make together. In the next lecture, I shall take up the duties of a vakil to the Court. Then will follow his duties to his clients and the public and other topics in succession.

TRANSLATION

OF

APARARKA'S COMMENTARY ON YAGNAVALKYA.

(*Continued.*)

Sloka 124 — Upanayanam of uninitiated brothers & marriage of unmarried daughters.

" Uninitiated brothers should be initiated by brothers already initiated; and sisters (married) by giving them a fourth part of their share." **124**

Those younger brothers to whom the initiatory ceremonies like jathakarma, etc., have not been performed by the father should be initiated by (their) seniors who have been (already) initiated. And to sisters to whom the samskara (ceremony) of marriage has not been performed, a fourth of the share of one son should be given to each. संस्कार्याः : *i. e.*, should be married.

Narada :—

For those brothers, for whom the initiatory ceremonies have not been duly performed by their father, they must be performed by the (other) brothers (defraying the expense) from the paternal property.[1]

In the absence of paternal wealth, the initiatory ceremonies must be invariably performed for their brothers by those previously initiated, contributing (the required) funds from their own portions."[2]

Vyasa :—Those who have not been initiated at the time of partition should be initiated according to the Sastras by their elder brothers from out of the paternal property; so also the maidens.

Manu :—To the *unmarried* daughters *by the same mother* let their brothers give portions out of their own allotments respectively, *according* to the classes of their several mothers; let each give a fourth of his own distinct share; and they who refuse to give it shall be degraded.[3]

Here too स्वेभ्योऽंशेभ्यः (*Swebhyo Amsebhyo*), the two words from "their share" (are used) with the intention of expressing only the sons' shares. The plural imports a plurality of maidens. The repetition in "one's own" (स्वात्स्वात्) imports maidens of several castes. The purport is as follows:—When a Brahmin has wives belonging to all castes and every one of them has a daughter for herself, the daughter of the Brahmini among them gets a fourth share of what the son of a Brahmini will get. Thus the daughters of a Brahmin by a Kshatriya woman, etc., are the takers of a fourth portion of the (share of the) son of a Kshat-

1. S. B. E., Vol. 33, p. 197; Narada, Ch. 13, § 33.
2. S. B. E., Vol. 33, p. 198; Narada, Ch. 13, §. 34.
3. Manu, Ch. IX, §. 118.

riya woman, etc. This is not to be taken as their *share*. By saying so the text harmonises with Baudhayana's saying in what he classifies to be a woman's deserts, *i.e.*,

Sloka 124 — Maiden Daughter's share.

" The Veda declares: " Therefore women are considered to be destitute of strength and of a portion.[1]

This is the rule of partition relating to members of the same caste. The Author now speaks of partition among members of different castes.

Sloka 125 — Partition among brothers of different castes

" The sons of a Brahmin in the several castes have four shares, three, two and one respectively; the sons of a Kshatriya three, two and one; and the sons of a Vaisya, two and one." **125**

Among the sons begotten of the four wives of a Brahmin, beginning from a Brahmin (wife) and ending with a Sudra (wife) the sons by a Brahmin woman shall take four parts of the father's wealth divided into ten parts. (The sons) by a Kshatriya (wife) (shall take) three (parts). (The sons) by a Vaisya (wife) (shall take) two (parts). The sons by a Sudra (wife) (shall take) one (part). Thus of the wealth of a Kshatriya divided into six parts, the sons by a Kshatriya woman shall take three parts, those by a Vaisya (woman) two, and those by a Sudra, one. The wealth of a Vaisya father is divisible into three parts; of them two parts to the sons by the Vaisya (wife) and one to the sons by the Sudra (wife). As to a Sudra, there is no wife of a different caste. In this matter, Brihaspati speaks of an exception :—

"Land which is received as a gift shall not be given to a son by the Kshatriya wife, etc. If perhaps the father gives, the son by a Brahmini wife shall take it away when the father is dead."

As to the land obtained otherwise than by gift, it is fit to be given (to a son by the Kshatriya wife, etc,) but not to (a son by the Sudra (wife). So also another Smriti.

"The son of the twice born by a Sudra woman does not deserve a share of the lands."

While (some) Smritis declare :—

"The son of a Brahmin, a Kshatriya or a Vaisya by a Sudra woman shall inherit no part of the estate. Whatever his fathe may give him, let that be is own".[2]

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1 S. B. E. Vol. 14, p. 231; Baudhayana, Ch. II. §. 46. cf. Yajurveda. Taitriya Samhita VI. 5, 8, 2; Manu, Ch. IX, 18.

(2) Manu Ch. IX, §. 155.

Sloka 125 — Partition among brothers of different castes.

This (rule) prohibits a share to one who is given something by the father. Otherwise the rule that prescribes a share for a Sudra son (becomes) meaningless.

The Author now mentions what should be done with regard to partible wealth which was concealed by a co-parcener and (afterwards) discovered.

Concealed effects.

" Effects which have been withheld from one co-parcener by another, and which are discovered after partition, they shall divide again in equal shares. This is a settled rule." 126

When partible wealth which has been taken away by any co-parcener is discovered after partition, then that wealth should be divided in equal shares ; and not unevenly by reason of preferential share (for the eldest). When this meaning is (taken as) propounded, this rule about the proper thing to be done is no authority for the blamelessness of the person who has embezzled.

OBJECTION. When the parceners are Brahmins and the partible property is gold and the man who embezzles the Brahmin's gold becomes degraded, then the rule that " they shall divide it equally" becomes unsuitable (inapplicable) ; because of the degraded (person) getting no share ;

ANSWER :—That is not so, because of the suitability of this rule in respect of other property at least. When a statement has a general application the limitation of its applicability by excluding particular things (from its operation) is not improper.[1]

Alternative answer No. 1:—Or if this rule is applicable even in the case (of the embezzling) of Brahmin's gold, even then, it does not imply the blamelessness of the person who has embezzled, because of the suitability of the rule to an equal partition when the person (who has embezzled) deserves to be associated with in the transaction after purificatory ceremonies.

(1) Here the statement is that the embezzled thing should be divided among all including the embezzler. This statement has a general application. The exclusion of a particular thing from its operation is the exclusion of the case of the stealer of Brahmin's gold from subsequent participation. The general rule of participation is thus limited in its scope by taking out of its sphere of operation the case of the embezzler of Brahmin's gold. it is meant here that such a limitation is not improper.

Allernative Answer No. 2:—Or the rule that "that should be divided equally" (may be understood) to be applicable to others except the person who has embezzled (the property) It cannot be said that that property does not belong to any before partition. Because it is said that common property which is the subject of ownership is divided and not that ownership arises by (reason of) partition.

Sloka 126

Canceealed Effect.

Katyayana :—"Recovering what has been embezzled by any one *of the co-parceners,* let sons, after the death of the father, distribute it equally among brothers.[1]"

So also :

"If the parceners have secreted part of the assets from each other and if any mistake has been made in the partition, what is recovered after it had been stolen or lost and that which is first mentioned should on discovery be again divided." "Abovementioned" that means divided on a mistake or secreted [2].

The partition of wealth among legitimate sons has been dealt with. The Author now deals with a kind of son begotten by a kinsman on one's wife.

"The son begotten by a sonless man on another's wife, on legal appointment, is the heir and giver of the *pinda* to both." 127

Dwyamushi yayana.

We should understand from the Dharmasastras that the son procreated by niyoga, dealt with in the first chapter[3] *i.e*, the son who is procreated by persons like a sonless husband's brother on another sonless man's wife according to the niyoga rule mentioned in the verse "being permitted by the Guru (etc.,)" for himself and for another, is called Dwyamushyayana and is the son of both the owner of the seed as well as the owner of the field (wife) and gets the wealth of both and gives the pinda to both. As to what is said by Narada :—

Dwamushyayanaka (the son of two fathers) shall give the funeral ball (of rice) and the water oblations to each of the two fathers separately; and shall receive one-half of the property left by the owners of the seed and the field respectively.[4]

This should be understood as applying to the case of the birth of a legitimate son after the birth of a *kshetraja.*

1. Cole brook II, p 485.
2. Colebrook II, p. 485.
3. Ch. I, §. 38.
4. B. E., Vol. 33, p. 195; Narada, Ch. 13, V. 24.

Sloka 127. Dwyamushyayana.

Katyayana.—"If the aurasa or legitimate son also is born, the (*kshetraja*) sons, etc., of an equal caste take a fourth share while those of unequal caste deserve to get food and raiment."

Therefore when the aurasa son (or legitimate) son is not born, the kshetraja takes the entire wealth of both the fathers. If (the *aurasa* is) born, he takes a fourth of the father's wealth. This is the conclusion.

As to what is said by Manu :—

"And when the aurasa son shares the paternal wealth, let him give a sixth part of it to the kshetraja (son of the wife begotten by a (*kshetraja*); or a fifth[1]".

Here, the sixth or the fifth share is in connection with a *kshetraja* of a few virtues. Similarly :—

"The *aurasa* and the *kshetraja* may succeed to the paternal estate; but the ten other sons can only succeed in their order to the family duties and to their share of the inheritance[2]".

That is to be understood when the *aurasa* is not virtuous and the *ksketraja* is eminently virtuous, *i.e.*, by reason of the mention of equal shares. With the exception of the *aurasa*, the *kshetraja* and the *putrika putra* (the son of an appointed daughter), if when (any of) the remaining ten sons are born an *aurasa* is born, the *aurasa* alone takes the whole wealth: the others take only a portion. As to family duties, they are equal to the *aurasa*.

Narada—Where a seed fructifies in the soil of another with the latter's assent, the son born of that (connection) is the common son of both the owner of the seed and the field (respectively).

Harita :—He who is born of a wife while under control and during the life-time of the husband is called *Dwyamushyayana* by reason of the seed not having been sown by him (the father). The field without the seed does not yield. The seed without the field does not sprout. As both are the cause, the son belongs to both (the field owner and the seed owner).

By reason of the seed not being sown means by reason of the field owner not sowing the seed.

After declaring the shares of the primary sons, the Author now speaks of the qualities of the secondary sons, prefacing them with the qualities of the primary sons.

S. SRINIVASA AIYAR.

(*To be continued.*)

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1. Manu, Ch. IX. V, 164. 2. Manu, Ch. IX, p. 145.

NOTES OF INDIAN CASES.

Suchand Ghosal *v.* Balaraffi Mardan.—I. L. R. 38 C. 1.—In this case a landlord obtained a rent decree against some the tenure-holders and brought the tenure to sale. One of the tenure-holders, not made a party, applied under S. 310-A to set aside the sale by payment of the amounts mentioned therein and the sale was set aside. He sued the other tenure-holders, the judgment-debtors in the suit, for contribution. Both the learned judges held that he was entitled to recover. They differed, however, as to the applicability of the correct section of the Contract Act governing the case. The *Chief Justice* held that S. 69 was the correct section; Mr. Justice *Doss* held that S. 70 was applicable. It may be premised that the present case is distinguishable from the case of *Yogambal Boyee Ammal* v. *Naina Pillai Markayar* [1] on the ground that in the latter case the person who made the payment was held subsequently to have no title to the property itself although the other facts were similar. Notwithstanding the elaborate judgment of Mr. Justice *Doss* it is very doubtful whether Ss. 69 and 70 are necessarily mutually exclusive. Officious or voluntary payments could not give rise to any liability under any of the sections. A liability under a contract such as that of joint promisors towards one another must be distinguished from the liability created by and referred to in Ss. 69 and 70. The actual decision therefore of Mr. Justice *Doss* in this case, viz., that the defendant's liability was one under S. 43 of the Contract Act might be strictly correct upon the actual facts of the case.

Harendra Kumar Bose v. Girishchandra Mitra.—I. L. R. 38 C. 24.—We doubt whether the principle of S. 145, Cr. P. C., does not render it obligatory on the Magistrate to summon witnesses at the instance of the parties or to compel their attendance after they have been summoned but failed to appear. Such a statement of the principle seems to be rather startling. The learned judges in the present case rely in support of their position upon the case of *Tarapada Biswas* v. *Nurul Huq* [2]. That apparently goes to the

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1. (1909) I. L. R. 33 M. 15. 2. (1905) I. L. R. 32. C 1093.

full length of the position taken up by their Lordships in this case. The learned judges in *Tarapada Biswas* v. *Nurul Huq*[1] rely upon the language of S. 145, clause (1), which provides that the Magistrate shall receive the evidence produced by the disputing parties, consider the effect of such evidence, and take such further evidence, if any, as he thinks necessary in the absence of any provision prescribing the procedure to followed. None of these circumstances negative the right of the party to establish his case by evidence and for that purpose the jurisdiction of the court under S. 145 necessarily carries with it the power and duty of the Court to summon witnesses. The learned Judges say that the whole object of S. 145 might be defeated if the court could be compelled to summon and re-summon witnesses at the choice of the parties. We think even in cases where the procedure prescribed is that prescribed in a summons or a warrant case, as the case may be the Magistrate is entitled to consider whether the process of the court is not being abused by the parties. If the evidence of the witnesses cited or summoned by the party be material and the person so summoned does not attend court the Magistrate is bound to help the party in establishing his case. Prior to the Code of 1898 there have been cases supporting this view of S. 145. If the legislature thought that these decisions were wrong the language of the section should have been changed thus ; but nothing of that sort has been done. According to S. 540, Cr. P. C., it is obligatory to summon and examine any person not previously summoned if his evidence appears to the court essential for the just decision of the case. *A fortiori* this must be essential when the person is already summoned but fails to attend. The duty of assisting parties and procuring attendance of witnesses is a duty inherent in every case over which the Magistrate has jurisdiction and we do not think that there is any encroachment upon the wording of the Legislature or adding words to those used by the Legislature by adopting the above suggestion. A contrary construction will result in great hardship and it will be asking the party to do what is impossible. According to S. 145, no orders can be passed if there exists no dispute likely to cause a breach of the peace. Again under the section the Magistrate is bound to try the fact of actual

1. (1905) I.L.R. 32. C. 1093.

possession. For this purpose evidence must be adduced. The party relying upon actual possession can only establish it by evidence of possession or documents. There is no use of saying that the party is entitled to show actual possession if he is not given means whereby to establish it. We think the right of the party to show actual possession necessarily carries with it a duty on the court acting under S. 145 to help the party to establish that right. As to the objection that if an elaborate enquiry be held the object of S. 145 would be defeated, we think the answer is in the proviso of the fourth clause of the section, *i. e.*, if the Magistrate considers the case to be one of emergency he may at any time attach the subject of of dispute pending his decision under the section. If the view adopted in this case be taken to be correct we think the sooner the Legislature intervenes to rectify this glaring defect the better.

SUMMARY OF ENGLISH CASES.

In re Griffith's Settlement: Griffith *v.* Waghorne.

[1911] 1 Ch. 246.

Construction—Will—"Appoint"—Children of a son, en ventre sa mere.

A testator purported to "appoint" certain funds forming the subject-matter of a marriage settlement over which he had a power of appointment in favour of his children, and which, in default of appointment, were to be his absolutely, to trustees upon trust, after payment of his debts etc., to distribute among his children equally. *Joyce* J. *held* that the proper way of looking at this will was not to view it as an exercise of the power of appointment, but only as a disposal of the funds as his absolute estate, which it would be if no appointment were made. The word "appoint" was taken to have been used not in the restricted sense of an exercise of power but in the wider sense of a gift or devise.

It was also held in this case that the rule that prevents a legacy in favour of the children of the testator from lapsing when such children die during the lifetime of the testator leaving issues applies in favour of a grandchild *en ventre sa mere* at the date of the testator's death.

In re **Broadwood: Lyall** *v.* **Broadwood:** [1911] 1 Ch. 277.

Specific legacy—Applied in satisfaction of debts—Compensation—The date when legatee can claim, the determining date.

A testator devised all the shares he held in a certain company to trustees upon trust to transfer the same to his infant son on his attaining the age of 21. The executors transferred some of the shares to a creditor in payment of his debt. *Held*: the legatee was entitled to compensation out of the residuary estate for the shares so transferred but the value of those shares was to be determined as on the date when he could have claimed the transfer of the shares, *viz.*, when he attained the age of twenty-one. It made no difference in principle whether the gift was to the son directly or through the intervention of trustees.

In re **Master's settlement : Master** *v.* **Master.**
[1911] 1 Ch. 321.

Settlement—Profits pending appointment, subsequent to cesser of life estate.

Where a fund is settled on trust for certain persons for life or till bankruptcy, remainder to such of his children as he might by deed appoint, in default to his children generally, *held*: on the bankruptcy of the tenant for life, pending appointment by him, the profits would go to the children and any appointment by him would operate only on the corpus and the income subsequent to the appointment.

Woodridge & Sons *v.* **Bellamy**: [1911] 1 Ch. 326.

Covenant "not to carry on the profession of solicitor"—"Doing business for client outside", not breach.

A covenant "not to carry on the profession of solicitor within a radius of five miles of the town-hall of Brentford" is not broken by one who settles outside the prohibited area but does some business for a client within that area by means of correspondence. There may be colourable evasions of covenants which courts will restrain, but this is not a case of that sort.

Napier v. Williams. [1911] 1 Ch. 361.

Covenant with oneself and others, void—Lease and covenant distinguished.

A will directed the trustees of the estate to give a lease of a portion of the estate to the testator's son if he so chose; the lease was to contain a covenant by the son to repair. A lease was executed; the lessee happened to be also one of the trustees. *Held*: the covenant was void as it was one by the son with himself and others though as trustees; the lease, however, was good.

Haynes v. Ford. [1911] 1 Ch. 375.

Statutory body—No power to waive rights held for the benefit of the public.

A body constituted by a statute has no power to abandon powers or rights entrusted to it as trustee for the inhabitants of a town.

Bowden Brothers v. Amalgamated Pictorials, Limited. [1911] 1 Ch. 386.

Common-law right to unpublished photographs—Injunction to protect.

The owner of an unpublished photograph has a common-law right to its publication and can have it protected by means of an injunction, though he may have in addition the statutory copyright which he is not in a position to enforce as he has not registered it.

Jones v. Llanurst Urban District Council. [1911] 1 Ch. 393.

Tidal stream—Pollution of stream by local sanitary authority—When reversioner can sue—Permanent injury.

A stream is not a tidal one when it is not influenced by ordinary tides; the fact that it is influenced by exceptional tides does not make it one.

A riparian owner on the banks of a natural stream is, whether he is the owner of any part of the river-bed or otherwise, entitled to the flow of the stream past his land in its natural

state of purity, undeteriorated by noxious matter discharged into it by others. Any one who fouls the water infringes his right of property and therefore he can maintain an action without proving that he has been actually damaged.

Any one who turns fœcal matter or allows fœcal matter collected by him or under his control to escape into a river in such a manner or under such conditions that it is carried, whether by the current or the wind, on to his neighbour's land, is guilty of trespass, on the principle of *Fletcher* v. *Rylands.*[1] This principle would apply to the owner of a sewer whether he made it or not, whether he has absolute property in it or only qualified property, as for instance in the case of a local sanitary authority. The action, even when the inhabitants have a statutory right, would lie to send their sewage into the authority's sewer.

A reversioner cannot maintain actions in the nature of trespass, including actions for the infringement of natural rights arising out of his ownership of land, without alleging or proving injury to the reversion. If the thing complained of is of such a permanent nature that the reversion may be injured, he may maintain the action. 'Permanent', in this connection, means such as will continue indefinitely unless something is done to remove it.

Thus a building which infringes ancient lights is permanent while a noisy trade or a right of way is not. Similarly, a sewer which opens into the river is a permanent injury since it is a necessary consequence of physical conditions that the sewage will flow into the river unless something is done to alter the state of things.

Watling *v.* Lewis. [1911] 1 Ch. 414.

Repugnant proviso—Proviso destroying liability—A covenant to indemnify but not so as to create personal liability.

As pointed out in *Williams* v. *Hathaway*[2] there is no objection to a proviso limiting the liability of a covenantor either in point of time or by specifying the particular fund out of which alone the payment is to be made. On the other hand, if the

1. (1868) L. R. 1, Ex. 256; L. R. 3 H.L. 330.
2. (1877) 6 Ch. D. 544.

proviso, instead of limiting the liability altogether destroys it, it is repugnant to the covenant and must be ignored.

A covenant by a trustee as trustee is only a personal covenant and not a covenant that renders the trust estate liable.

Applying these principles it was held in this case that a proviso to a covenant by certain persons as trustees to indemnify the covenantee against any claim in respect of a mortgage to which the property transferred to them was subject, that it was not to create any personal liability on their part, was altogether repugnant and the trustees were personally liable on the covenant to indemnify the covenantee.

Angel *v.* **Jay.** [1911] I K. B. 666.

Landlord and tenant—Lease—Executed contract—Innocent misrepresentation—Rescission—Equitable jurisdiction.

Plaintiff and defendant entered into an agreement whereby the plaintiff agreed to take and the defendant to grant the lease of a certain dwelling house and premises for a term of years. Plaintiff went into possession. *Held*, in a suit for damages for breach of warranty and for the cancellation of the agreement, that a court of equity will not rescind an executed lease on the ground of innocent misrepresentation.

Rex *v.* **Taylor.** [1911] I. K. B. 674.

Criminal law—Larceny—Evidence of removal.

If a man puts his hand into another's pocket, seizes his purse, removes it from the position in which it was at the bottom of the pocket to the edge of the pocket and is only prevented from taking it entirely out of the pocket by some obstruction there is sufficient asportation to constitute larceny.

Seldon *v.* **White.** [1911] I. K. B. 701.

Solicitor—Default in delivering bill of costs—Motion for attachment—Order for payment of costs—Enforcement by action.

A judge made an order that the defendant, a solicitor, should pay the costs of a motion for the attachment of the defendant for contempt of court in his not having delivered to the plaintiff a

bill of costs pursuant to the court's order. The costs were taxed and the plaintiff brought an action to recover the amount. *Held* by the C. A. (*Vaughan Williams* L. J. dissenting) that the order was not made in a criminal or quasi-criminal matter and that the action was maintainable.

Carlton Illustrators *v.* Coleman & Co.

[1911] I. K. B. 771.

Copyright—Picture—Reproduction without author's consent—Enlargement—Alteration—Action to recover penalty—Injunction.

Plaintiff, an artist, made a five line drawing which bore his signature under a contract with the defendants for the purpose of being used by them for advertisement. The copyright vested in the defendants. Without the consent of the plaintiff the defendants enlarged and coloured and caused copies of the drawing with plaintiff's name thereon to be exhibited by porters as an advertisement. In an action for injunction and damages evidence was given that the alteration and colouring would be damaging to the plaintiff's reputation as an artist. *Held*, that the defendants had committed by their alteration an infringement of the copyright under the Copyright Act, S. 7, and that the plaintiff was entitled to recover penalty and to an injunction to restrain future breaches.

Deyes *v.* Wood & others.

[1911] I. K. B. 886 (C. A).

Company—Debentures—Receiver—Appointment by debenture-holders—Payment of remuneration by—Agent of debenture-holders.

The plaintiff as receiver for debenture-holders in a certain Company sued the defendants as debenture-holders for remuneration as such receiver. The Company issued debentures some of which were held by defendants. Each debenture charged the repayment of principal and interest on the present and future property of the Company. One of the conditions was that at any time after the principal moneys thereby secured become payable, the registered holder of this debenture may with the consent in writing of the holders of the majority in value of outstanding debentures of the same issue appoint any person or persons by writing to

be receiver of the property charged and such appointment shall be as effective, etc". The moneys secured having become payable, the defendants being holders of the majority in value of the debentures appointed the plaintiff as receiver. *Held*, that upon the terms of the condition in the debenture the receiver in doing the services was acting as agent of the debenture holders and that he was therefore entitled to remuneration from the holders.

Talbot *v.* Vonoboris and wife.—[1911] 1 K. B. 54 (C.A)

Negotiable instrument—Pro-note—Signature obtained by duress—Knowledge of duress by payee—Onus of proof.

The plaintiff advanced moneys to the defendant's husband upon joint and several promissory notes made by the husband and wife upon which notes an action was brought. The defendant (wife) pleaded that she was induced to sign the note by duress on the part of her husband and that plaintiff had knowledge of the same. The finding was that the signature was obtained by duress, but that the plaintiff knew nothing about it. The Court held that the onus of proving knowledge of duress lay on the part of the defendants and was not shifted by S. 70, Sub-Section 2, of the of Bill Exchange Act, 1882.

Crippen, *in re* **Estate of.**—[1911] Probate, p. 108.

Probate—Administration—Practice—Husband and wife—Conviction—Effect of—Evidence—Res, inter alios acta—Legal representative of husband.

Where a convicted felon or the personal representative of a convicted felon who has been executed brings any civil proceeding to establish claims or to enforce rights which result to the felon or to the convicted testator from his own crime, the conviction is admissible in evidence not merely as proof of the conviction but also as presumptive proof of the commission of the crime.

In this case the husband murdered his wife. He made a will after his conviction appointing a person his executrix and universal legatee who claimed as such to administer the murdered

wife's estate and as legatee to be entitled to the murdered wife's property. *Held*, the conviction was a special circumstance within the meaning of S. 73 of the Court of Probate Act, 1857, which gives a discretion to the Judge to appoint or not; and the Court granted administration to the estate of the deceased wife upon the application of one of her sisters.

Dictum of *Lord Bramwell* in *Leyman* v. *Dahmes*[1] doubted.

Richards *v.* **Starck.** [1911] 1 K. B. 296.

Gaming—Wagering contract—Stock-broker — Payment of deposit—Repayment in any event.

Defendant, a stock-broker, issued a printed circular which stated that if persons desirous of participating in his scheme deposited a sum of money whether £ 5 or £ 10 or some multiple thereof, with the defendant who was to be at liberty to speculate with it on the stock exchange and in certain stocks and if at the end of three months from the date of the deposit the price of those stocks was higher than the price at the date when the deposit was made the defendant would undertake to pay to the depositor the amount of his deposit and also the amount of the rise in the price of the stocks less 10 p. c. upon this latter amount. The plaintiff paid £ 20 to defendant under the terms of the circular and another £ 20 in respect of a similar trust. At the end of some time there was some profit in the first named trust, the second resulting in loss. The defendant paid £ 20 the amount of the subscription in the first trust. In a suit to recover the profit less 10 p. c. and the subscription in the second trust: *Held*: the plaintiff was not entitled to recover on the ground that though he would not lose anything under the terms of the circular, yet in as much as plaintiff lost his interest on the deposit that was sufficient to make the contract a wagering one.

In re **Bagley.** [1911] 1 K. B. 317 (C. A.)

Insolvency—garnishee order—Effect of receiving order on—Bankruptcy notice before discharge of Garnishee order.

One *G* obtained a decree against *B* for £ 550 in May 1909. In June 1909 *M* and *W* recovered judgment against *G* for

1. (1878) 3 Ex. D. 352.

£ 657. In July 1909 *M* and *W* obtained a garnishee order *nisi* against *B* on the judgment recovered against him by *G*. In December they served a bankruptcy notice on *B* for £ 669 and a receiving order was made against *G* as he did not comply with the notice. In October 1909 *B* executed an assignment of his property for the benefit of his creditors and this deed was assented to by the trustee in *G*'s bankruptcy. In June 1910, having first obtained leave to issue execution, the trustee served a bankruptcy notice against *B* in respect of the judgment and on *B*'s failure to comply with the notice the trustee presented a petition. The petition was opposed on the ground that until the discharge of the garnishee order no bankruptcy notice could be served on *B* and on the ground that the trustee had assented to the deed of arrangement the trustee was not in a position to present a petition. But a receiving order was made by the registrar. On appeal it was *held* that it was not necessary that the garnishee order should be discharged before the trustee can serve notice as the receiving order put an end to the garnishee order.

Burden *v.* Rigler. [1911] 1 K. B. 337.

Public meeting—Held on highway—Legality of.

A public meeting held on a highway is not necessarily unlawful. In order to make it unlawful there must be some interference with police regulations.

Dyson *v.* Attorney-General. [1911] I. K. B. 410 (C. A.).

Practice—Relief against Crown—Declaratory judgment—Action against Attorney-General — Striking out pleadings—Order XXV, rr. 4 & 5—Cause of action.

Plaintiff was served with a notice calling on him to give some information and threatening him with penalties in case the inquiries were not answered before a certain date. Plaintiff brought the present suit against the Attorney-General for a declaration that he is under no obligation to comply.

The Attorney-General took out summons under Order XXV, rule 4, to strike out the statement of claims as disclosing no cause of action, stating that he was not a proper party and the proper remedy for the plaintiff was by petition of right. The judge

dismissed the plaintiff's suit. On appeal it was *held* that Order XXV, r. 4, was not intended to apply to any pleading which raises any serious question of law and any question of general *and public* importance; that the court had jurisdiction to maintain an action against the Attorney-General as representing the Crown although the immediate and sole object of the suit was to affect the rights of the Crown in favour of the plaintiffs: and that a declaratory judgment could be made against the Attorney-General under Order XXV, rule 5.

Saqui & Lawrence *v.* Stearns.

[1911] 1 K. B. 426 (C. A.)

Insurance—Burglary policy—Exception—Theft by member of household or staff—Theft by one of the staff—Accessory after the fact—Principal.

Plaintiffs effected an insurance on the stock of their jewellery in their premises against burglary and theft. The policy contained a proviso excepting loss by theft, robbery etc., by members of the assured's household or business staff. An employee of the business staff admitted a thief into the premises in compliance with a scheme. The theft took place in the absence of the employee. In a suit by the plaintiffs against the underwriters it was *held* that the case fell within the priviso and the defendants were not liable (by the Division Bench) because the employee was an accessory before the fact (by the Court of Appeal) because he was a principal.

Whitehorn Brothers *v.* Davison.

[1911] 1 K. B. 463 (C. A.)

Contract—Sale of goods—Voidable contract—Pledge by purchaser—Transferee in good faith—Onus of proof—Larceny by trick.

Plaintiffs, jewellers, were induced, by the false representation of one *B* made with a fraudulent intent, to part with some of their jewels to another on sale or return for getting a customer to purchase it from him. Then *B* pledged the jewels to the defendant. In an action by the plaintiffs to recover the jewel from the defendant, *held* that plaintiffs were not entitled

Where there is a contract of sale which is voidable on the ground of fraud or for any other reason and before it is avoided by the seller the buyer, as against whom it could have been avoided, has transferred the subject matter of the contract to an innocent person who has given value and accepted the transfer without knowledge of anything wrong or any knowledge of any such circumstances as might lead him to wish not to make any further inquiry lest he should find anything wrong, the contract cannot be avoided against that person, and the onus of proving that the third person is not an innocent purchaser rests on the plaintiff and not on the defendant.

Carlisle and Cumberland Banking Co. *v.* Bragg.

[1911] 1 K. B. 489 (C. A.)

Contract—Signature obtained by fraud—Ignorance of contents—Defence 'non est factum'—Negligence—Estoppel.

Plaintiffs brought an action upon a document which purported to be a continuing guarantee by the defendant up to a certain amount for the payment by one *R* to the plaintiffs of any sum which might at any time thereafter be or become due from him to the plaintiffs on the general balance of his banking account with them. Defendant, induced by the fraud of *R*, signed the document without reading it and not knowing that it was a guarantee but supposing it to be a different document. *R* subsequently forged the signature of an attesting witness to it and handed the document to plaintiffs. The jury found that the document was obtained by fraud and that the defendant was negligent in signing the document.

Held, in an action on the deed, that the defendant was not estopped from denying his liability on the supposed guarantee and that the fraudulent action of *R* and not the negligence of defendant was the proximate cause of plaintiff's loss.

Rawson *v.* Platt. [1911] 1 K. B. 499.

Bailment—Warehouseman—Negligence—Claims by third person—Duty of bailee—Notice to husband.

Plaintiff, a married woman living separately, deposited certain goods of hers with the defendant, a warehouseman, the

charge being agreed upon between plaintiff and defendant. Plaintiff's husband subsequently went to the warehouseman and demanded the goods. Upon the defendant refusing to give except under a Magistrate's order they went to a Magistrate who ordered the goods to be delivered to the husband. The defendant did not give notice of the claim to the plaintiff. The plaintiff subsequently brought an action in the County Court for recovery of the articles or their value and damages. The judge directed that the defendant would be responsible if he were negligent. The jury found negligence on the part of the defendant and the judge gave judgment for the plaintiff. On appeal the Division Court held that the defendant represented to the Magistrate that the articles were deposited with him by the plaintiff and that as he had done that, there was no negligence on his part and therefore plaintiff's suit must be dismissed.

Apple *v.* Wright. [1911] 1 K. B. 506.

Landlord and tenant—House—Lease to kept woman—Right to recover rent—Immoral purpose.

Plaintiff's agent let a house to defendant for a term of three years. After the expiration of three years defendant continued as tenant from year to year. The agent knew, at the time he let the house, that the defendant was an immoral woman, being the kept woman of a certain man, and that the rent would he paid by the man. In an action to recover the rent:—*Held* that the plaintiff was not entitled to recover as the house was let for an immoral purpose.

London & North-Western Railway Co. *v.* South Eastern Railway Co. [1911] 1 K. B. 534.

Railway—Lease of wharf by Railway as to traders—Railway company reserving right to choose route for traffic to and from wharf — Other lines — Rates same — Undue preference — Reasonable facilities.

It is not a contravention of the Traffic Act and Rules for a Railway company, in a tenancy agreement made between it and certain traders, to impose and enforce a condition entitling the

Railway company to direct by which one of two competitve routes in connection with its railway, through traffic consigned to the trade (rates being the same) shall be carried.

Defendants, a Railway company, owners of lands adjoining their stations let portions of the land by agreement in writing to traders to use as wharves. The tenant of each wharf agreed that he would order all traffic through defendants' route and, the rates being equal, that the defendants should decide by what routes the traffic consigned over their own and other routes should travel. The plaintiffs were competitors to the defendants' company. The defendants required their tenants to have their traffic consigned to the wharves by a different route. In an application by plaintiffs to restrain defendants from giving undue preference and from subjecting plaintiffs to unreasonable prejudice: *Held* that plaintiffs were not entitled to the order asked for.

The King *v.* Manchester Corporation.

[1911] 1 K. B. 560.

Mandamus—Prosecutor—Sufficiency of interest.

Where the applicants for the benefit of the general public and through them of their own trade interests also, oppose a bill before Parliament and promise the insertion in the bill of a clause imposing a particular duty upon the promoters or other persons, they have a sufficient interest in the performance by the promoters of their statutory duty so as to entitle them to apply for a mandamus to enforce it.

JOTTINGS AND CUTTINGS.

The British Bench and Bar.—Having recently, during a leisurely stay in different parts of Great Britian—more particularly in London, Glasgow and Edinburgh—had the profitable pleasure of visiting the Law Courts day after day and observing the way in which Justice, both Civil and Criminal, is administered, it may be of interest to your readers to know about the things that appeal to one most as worthy of praise or criticism There are, as we know, many people who, either from habits or opinions formed in earlier days or from some other cause, are constantly reminding us that in all matters

relating to the procedure of the Courts and the ability and conduct of the Bench and Bar the English are immensely superior. And perhaps they are. But in this, as in all other things, no country has a monopoly of the best of everything, and so it is we find that in some respects we lag far behind them whilst in others we surpass them. Let me tell you some of the impressions or opinions I formed.

First of all, it is plain that the separation of the work of the barrister from that of the solicitor tends to produce, and I am certain does produce, a greater percentage of truth as to facts and a more accurate result as to law than the combined system in vogue with us. Law is not by any means an exact science, but it is surprising how near to perfection it can become in the hands of counsel, who are unencumbered with the details and cares of a solicitor's practice, and are thus able to concentrate their whole attention upon a well prepared brief. The examination and cross-examination of witnesses becomes more of an art than with us. Well laid plans to circumvent and entrap the untruthful witness are more in evidence, and the law applicable to the case is stated or argued with more precision. Counsel are more careful in stating their facts and seldom or never do you hear them contending for a proposition of law except upon grounds that are fairly arguable. Some of our best Canadian Counsel take the position that it is their duty to put forward all the points of law that occur to them, leaving it to the Judge, assisted by the opposing counsel, to sift the wheat from the chaff. With a strong Judge this way of handling a case presents no advantages. With a weaker one it ought not to be attempted unless upon the theory that the sole business of counsel is to bear fruit for his client. But counsel is more than an advocate paid to win by any means. He is an official of the Court whose duty it is to assist the Court in arriving at the right conclusion. Time and again do English Counsel agree with each other as to what the law is or narrow down the points of law in dispute so as to make it comparatively easy to arrive at a correct decision. And this is, I think, as it ought to be.

Speaking of counsel being well prepared, I once heard a Judge comment upon the way some cases are handled, and this is what, in substance, he said: "If counsel only knew how the presiding Judge appreciates the work of one who is seen to have mastered his brief and to know his facts and law, I think fewer of them would conduct their cases in the careless manner in which they are sometimes conducted. There are few things that tend to put a Judge out of temper

so much as to have the whole case both as to facts and law thrown at him with a pitchfork as a farmer handles his fodder. A Judge leans towards helping the man who is seen to be doing his very best and becomes disgusted with the counsel, whatever his ability may be, who is seen not to be prepared." Under this heading it must be admitted that the English Judges have less to complain of than have our own.

It is needless to say, of course, that the English Judge presides with great dignity and has complete command of the Court. It is seldom that counsel steps outside his own territory and seeks to run the Court. The moment he does so he is effectually checked. In the Old Bailey this summer, I heard the trial of a man who was charged with forging a will. The prisoner's counsel, in addressing the Court, made it clear that in his opinion his opponents' conduct of the case had been such as to cause a miscarriage of justice. He said that never during the whole course of his professional experience had he seen a case conducted with such a total disregard of consequences. Lord Justice Ridley listened to him patiently and then in his own quiet way said, "Mr. ——— you appear to be under the mistaken impression that you are master of the situation here. I need not, of course, remind you that the presiding Judge is supposed to occupy and, as a matter of fact, does occupy that proud position. I do not want to hear anything further from you upon this line." Mr. ——— was of course completely taken back and the trial was proceeded with. But after all the English Judges preside with no more dignity or control than do the Ontario Judges. I can see very little difference between them in that respect. But in another respect we are ahead of them. The Judges are too slow with their work. The shorthand reporting system is not developed as is our own and the result is that the Judge has to make very full notes of the evidence. This takes up unnecessary time, so much so that the subject has been referred to several times in the House of Commons.

One thing very noticeable in connection with the administration of justice in England is the entire absence of any criticism in the public press. This is not surprising so far as the trials of cases are concerned, for we have little of that in this country, but there seems to be little or no criticism of public judicial officers. What occurred to me as strange was that in the *Crippen* case, Scotland yard was not criticised for allowing Crippen to get out of the country. It will be remembered that they had suspicions as to Crippen some weeks before he left. In fact, Scotland

yard had made one examination of the house and had found nothing. It is true that there was no sufficient evidence of the murder upon which they could have arrested Crippen, but it did seem to Canadians that they might well have kept him under surveillance and thus prevented him from leaving London. This, however, was not done. Strange to say, the London papers instead of offering criticism of Scotland yard commended the authorities in every way. It is important, of course, that the authorities should receive at all times healthy support. Irresponsible and unwarranted criticism is always to be regretted. But one cannot help feeling that a reasonable amount of well reasoned criticism has a splendid effect in keeping officials stirred up to the point of duty.

Our American friends urge this as a reason for electing their Judges. Andrew Carnegie, on his last visit to Toronto, was heard to say that he was a thorough believer in the system of electing Judges, that there was nothing like public opinion to keep the Bench pure, that he had known several instances where a Judge had done something or taken some position which aroused the suspicion of the public or confirmed them in the belief that he had departed from the path of rectitude, and that when such Judge sought rec-lection he was invariably defeated.

But I am straying from the path myself.

In looking at the way trials are conducted in English Courts one cannot, with all our admiration, fail to conclude that the High Court of Justice in England is rapidly becoming, if it has not already become, a rich man's Court. The fees that successful barristers command, added to the solicitor's costs which are higher than ours, make the total expense of the litigation out of all proportion to the amount involved unless that amount should be very large. The jurisdiction of the County Courts is much more limited than our own. The client who has a claim of a moderate amount, or who is himself a man of moderate means, hesitates long before availing himself of the Courts. I am not a prophet, but I do predict that a radical change in the judicial system is about to take place, and that this change will consist largely of a substantial increase in the jurisdiction of the County Courts.

While on this subject of County Courts let me say that at the County Sessions three Justices of the Peace sit with the Judge. They take no part in the trial, but when a conviction is made they always consult with the Judge as to the punishment to be meted out. Might

not our own County Judges consider whether the plan is practicable here? The question of punishment is not one of law. It is something that calls only for sober common sense and good judgment. In a multitude of counsellors there is often, though sometimes there is not, great wisdom.

A great change has come over the English Bench on this subject of punishment. Lighter sentences are becoming more common and the suspended sentence in the case of first offenders is often made use of where the criminal has theretofore borne a good character and the crime is not of a serious character. All this you may think is tending in the right direction.

Another feature noticed particularly in the Scotch Courts—whether it is of modern growth or not I cannot say—is the effort that is made to save time in getting out facts as to which there is no dispute. I mean by this the asking of leading questions. A witness is put in the box; it may be necessary to get from him his age, occupation, experience, residence, nationality, whether he was present on the occasion in question, etc. With us, perhaps, a dozen questions would be asked to obtain this information and as many answers received. Not so with them. One question is asked in the following form. "Your name is John Smith, 30 years of age; you are a carpenter with ten years' experience; you live at 50 Jones Street, you are a Scotsman and you were present on the occasion in question?" One answer in the affirmative is given and much time saved.

These are a few of the impressions I received of the things I noticed. I give them for the benefit or otherwise of my brethren of the Bar. If they seem to bear hard upon ourselves let us remember that—

"Those bear reproof the best who merit praise."—OBITER DICTA.

Canadian Law Times.

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Age Limit for Judges.—MR. RENDALL asked the Prime Minister whether he proposed to introduce legislation, as suggested in last year's debate on the Judicature Bill, to enact an age limit to the services of Judges of the High Court; and whether, if time would not permit of this during the present Session, provision could be made under the forthcoming Budget for increasing the retiring pension of such Judges to a sum equal to, or in special cases to a sum in excess of, their annual salary so as to tempt aged Judges to retire without loss of income when their 15 years' pensionable service was completed.

MR. ASQUITH: It has not been necessary in the past to fix any statutory limit of age, because in the main a sense of public duty has led Judges to retire when unable efficiently to discharge their very responsible duties. His Majesty's Government hopes that it may not become necessary to make any change in this respect. The present pension is £3,500 a year for all Judges except Lords of Appeal, the Lord Justice, and the Master of the Rolls; and the Government consider the pension is already ample.

MR. RENDALL: Is it not the fact that at present the only way to get rid of an unsuitable Judge is to make him a member of the House of Lords?

To Mr. Rendall's supplementary question the Prime Minister gave no answer.—*Feb.* 14.

On the above question and answer the *English Law Journal* remarks:—MR. ASQUITH's reply to a question put to him in the House of Commons on Tuesday as to the desirability of applying an age limit to judges assumed rather a piquant form. 'It has not been necessary in the past to fix any statutory limit of age, because, in the main, a sense of public duty has led judges to retire when unable efficiently to discharge their very responsible duties. His Majesty's Government hope that it may not become necessary to make any change in this respect.' Is this to be accepted as an indication that, in the opinion of the Government, there are judges now on the Bench whose reluctance to take their pensions ought to cease? At the present time there are five judges who are entitled to take their retiring allowances. Mr. Justice Grantham has been on the Bench twenty-five years, Lord Macnaghten twenty-three, Mr. Justice Lawrence twenty-one, Lord Justice Vaughan Williams twenty and Lord Justice Kennedy eighteen. It deserves to be noted that these five judges, by remaining on the Bench after they had earned their pensions, have already saved the country no less a sum than £ 112,000. The senior judge in point of service is not necessarily the oldest in point of years. Mr. Justice Grantham, though the 'Father of the Bench,' with a quarter of a century's service, is younger than Lord Macnaghten and Mr. Justice Lawrence, and very little older than Mr. Justice Channell, who was not appointed a judge until Mr. Justice Grantham had nearly earned the right to retire. The difficulty about an age limit for the Bench is in fixing it. There have been not a few judges who have rendered the public the most distinguished service after they had attained the age of seventy-five. The question is not, however, to be determined

in the light of these great luminaries of the Bench, and it would certainly not be prejudicial to the interests of the administration of justice, regarded as a whole, if judges were required to retire when their years exceeded the Psalmist's allowance by five.

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Sir Edwared Clarke.—SIR EDWARD CLARKE, K. C., completed his 70th year. At the conclusion of a lengthy argument in the Lord Chief Justice's Court, he apologised for having occupied the time of the Court so long. 'I congratulate you, Sir Edward, upon the force of your argument,' said the Lord Chief Justice. 'I hope others will be able to do as well on the anniversary of their seventieth birthday.'—*The Law Journal.*

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Misuse of Words in Law.—Those who look to the law profession for a livelihood may "thank their lucky stars" that the average laymen, disregarding precept upon precept," stumbles on in the misuse of the English language, since such misuse exemplified in home made contracts, deeds, and wills, affords much litigation, with attending fees. But words are the lawyers and the judges tools, and if either does not know how to use them, he endangers his own success and the interests of those depending upon his acts and judgment. "Here one poor word a hundred clinches makes." Three faults frequently found in language used in the law are autology, prolixity, and the use of inappropiate words. All three of them discredit the offender intellectually to a greater or less extent ; but the last mentioned is the most grievous, in that it frequently results in disastrous litigation, especially in case of contracts, deeds and wills. To illustrate, Mathews, in his "Words ; Their Use and Abuse," tells of an Englishwoman who, desiring to leave her clothing, etc., to a servant, described them in her will as "personalty," and unwittingly included in her bequest nearly 50,000 dollars.

Real estate is not "bequeathed," personalty is not "devised," and a testamentary donee of personalty is not a "devisee." "Personalty" is not the same as "personality."

The plural of "cestui que trust" is "cestuis que trust" not "cestuis que trustent."

One's main calling is not his "avocation," and his secondary occupation is not a "vocation."

"Balance" is improperly used to denote the "remainder" of a thing when part is taken away.

A "depository" is one with whom a thing is deposited ; a "depositary" is a place of deposit.

"Party" is not a synonym of "person;" its meaning being restricted to one who participates in a cause, action, contract, etc.

"Providing" is often improperly used as a conjunction, instead of "provided."

"Deceased" is commonly misused to designate a descedent, though not authorised by the dictionaries as a noun.

When properly used, "vendor" implies a sale of real estate, and "seller" a sale of personalty. The best usage approves "buyer" as designating one who acquires personalty, and "purchaser" as designating one acquiring real estate, rendering "vendee" obsolescent.

Some appellate opinions recite that the "case" is affirmed or reversed, when obviously "judgment" or "order" is meant.

"Elect" implies a vote, generally popular, though sometimes restricted, and is not synonymous with "appoint," or other modes of filling positions.

"Marital" is properly applied only to the husband's relation, while "matrimonial" may be used respecting him or the wife, or the marriage relation generally.

"Accused" is more appropriate than "defendant," in speaking of one charged with an offence, in that it implies a criminal case.

"Per," being a Latin preposition, is properly joined with Latin words only: "Per diem," or "for a day"; "per annum" or "for a year."

A decision may "conflict" with a decision of a co-ordinate or independent court, but cannot "overrule" it.

"Et al," though brief, is ambiguous, in that it does not indicate whether "and another" or "and other" is meant.

"Et als" is a mongrel, being Latin on its mother's and English on its father's side. In one appellate court "etc." is required to do the duty of "and another" and "and others" in the title of cases.

Property is not divided "between" several persons, but "among" them.

An offer to do an act is a "proposal" and not a "proposition."

Money is "lent," and not "loaned."

An utterance by word of mouth is oral," "while anything written or spoke in words is "verbal."

"Plead" is improperly used in the past tense.

"Relative" is better than "relation," in speaking of one's kindred.

"Number" is not synonymous with "several,"

Confusion of the little words "or" and "and" in statutes and contracts has furnished the basis of many legal controversies.

Though "Mr." is in a sense a complimentary term, an appellate judge recently referred in his opinion to one whose conviction, of a felony was affirmed as "Mr. Pirkey."

In statements of fact on appeal, identity of the parties is frequently obscured by referring to appellant in one place as appellant, in another as plaintiff; to defendant as accused, and in another as Jones, or whatever his surname may be.

The chief evils of Tautology, and his half brother, Prolixity, lie in the lengthening of sentences, and the consequent tendency to obscure the idea intended to be conveyed. As Southey says: "If you would be pungent, be brief; for it is with words, as with sunbeams, the more they are condensed, the deeper they burn." And as another has said: "He that uses many words in explaining a subject doth like the cuttle-fish hide himself for the most part in his own ink."

Here are some common tautological blunders gleaned from the opinion of the appellate courts: "Conspire together," "verdict of the jury," "oral testimony," "instructions to the jury," "findings of fact," "testimony of witnesses," "conveyed away."

The following are very common examples of prolixity, to be found in briefs and judicial opinions :—

"Notwithstanding the fact" for "though;" "guilty of negligence" for "negligent;" "in pursuance of the provisions of" for "under;" "a man by the name of" for "a man named;" "a contract for the construction of" for "a contract to construct;" "for the purpose of" for "to;" "by reason of which" for "whereby;" "by reason of the fact that" for "because" or "since."—*Canadian Law Times*.

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A rule of Professional Etiquette:—Their Lordships Mr. Justice *Benson* and Mr. Justice *Sundara Aiyar* affirmed a sound and recognised rule of professional etiquette, very rarely we believe, forgotten by the members of the profession, when they declined to hear recently an advocate in a part-heard civil case which had been argued on a prior occasion by another member of the bar, without being assured of the latter's permission to the former so to appear. The matter arose in this way. On a Friday a learned Vakil of the Court who had himself filed the appeal commenced the argument and was opening the case for the

appellant when the Court rose for the day. On the suceeding Monday when their Lordships reassembled, a learned Advocate of the Court represented to the court that the brief in the case was handed to him only the previous night and requested the Court for an adjournment to enable him to prepare the case adequately. Another member of the bar represented to their Lordships that the Vakil who had argued the case was absent on account of sudden illness, but had asked him to appear and argue the case, that the client had taken away the records on Friday evening on some pretext promising to return the same the next morning, but had not turned up. Their Lordships asked the Advocate if he had the permission of the Vakil who was originally in the case to appear. The Advocate replied that he knew nothing of it and that the Attorney who gave him the brief should be asked about the matter; the Attorney was not present then in court and their Lordships intimated to the advocate that they declined to hear any but the Vakil who was in the case originally and had left the case part-heard or some other who had his permission to appear in the case. We need hardly say the procedure adopted by the learned judges is highly commendable though there is no rule or regulation to enforce this form of professional etiquette. We are aware, it has always been recognized by every branch of the profession, and it is rarely, if at all, we have heard even whispers of any breach of this rule. We are glad that the learned Judges recognized the importance of the expression of their view on the matter and of the effect it will have on the general consciousness of all the branches of the profession.

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Pleading by agents.—Their Lordships *Benson* and *Sundara Aiyar* J.J. held in another matter which came up beforethem recently that a person had no right to be heard by an agent and that none but a recognized practitioner could plead in a case before them. They drew a distinction between the right of appearance and the right of pleading and held that though a person might appear by an agent, he could not be allowed to plead by any agent other than a member of the profession. We need hardly say that this view accords with the general sense of the profession as regards their sole right to plead before courts; otherwise, their privilege will in theory amount to nothing as in each case a non-licensed person can be appointed a special agent to plead for the party in the case. Their Lordships have fully dealt with the legal aspect of the question and we think it unnecessary to dwell upon it at length.